35922-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS G. MARLIN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it ordered restitution for the assault victim's out-of-pocket medical expenses and ordered reimbursement to Medicare of Washington for treatment the victim received subsequent to the assault?

2. Should the $200 filing fee be stricken based upon indigency where *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) applies?

II. STATEMENT OF THE CASE

Mr. Louis Dupuy, a Cheney resident, was a friend of the defendant, Mr. Thomas Marlin. RP 159-60.[1] Dupuy owed the defendant $20 or $25, a sum the defendant tried to collect from Dupuy on March 18, 2016. RP 160. On that day, the defendant went to Dupuy's residence, a trailer, banged on the door, and demanded his money. RP 161. After a minute, Dupuy stepped out on the porch and attempted to calm the defendant. RP 162. Dupuy placed his hand on the defendant's elbow and asked him to leave. RP 162.

[1] "RP" refers to the verbatim report of proceedings transcribed by Court Reporter Korina Krebs. It consists of 384 pages covering the jury trial presided over by Superior Court Judge John Cooney (January 16, 17, 18, 2018 and March 7, 2018). The second verbatim report of proceedings is designated as "2RP." It consists of 53 pages and was prepared by Court Reporter Mark Sanchez. It covers the testimony taken at the restitution hearing held May 31, 2018. "3RP" consists of 61 pages prepared by Court Reporter Terri Rosadovelazquez. It covers the June 1, 2018 oral arguments and ruling by the trial court on the restitution issues.

Apparently complying with the request, the defendant turned and walked down the steps and Dupuy turned and started back into the trailer. *Id.*

However, the defendant returned up the stairs and attempted to head-butt Dupuy. RP 163. He then picked Dupuy up, in a bearhug, and slammed him into the stair railing and then attempted to flip him over it. RP 163. The defendant then slammed Dupuy into the other railing, with all of his weight on Dupuy – Dupuy then heard his spine crack. RP 163. After threatening Dupuy with death, the defendant sped off in his truck. RP 168.

Because of the assault, Dupuy went to see his regular doctor, Dr. Lahtinen. RP 118. This visit occurred the same day as the assault. *Id*. Dupuy was already scheduled to see Dr. Lahtinen that day for other pre-existing conditions. RP 121, 123. Dr. Lahtinen ordered x-rays of the pelvis, hip, and shoulder because of Dupuy's new injuries.

Three days after the assault, on March 21, 2016, Dupuy was seen regarding his continuing severe low back pain and shoulder pain related to the assault. RP 129. Additional x-rays and a CT scan revealed fractures in Dupuy's spine at L1 and L2,[2] as well as a fracture of the 12th rib. RP 118-

[2] The lumbar vertebrae are, in human anatomy, the five vertebrae between the rib cage and the pelvis. They are the largest segments of the vertebral column and are characterized by the absence of the foramen transversarium within the transverse process (since it is only found in the cervical region) and by the absence of facets on the sides of the body (as found only in the thoracic region). They are designated L1 to L5, starting at the top. The

20, 132, 135, 138. These fractures were diagnosed by Dr. Williams Keyes, a specialist in neuroradiology, as being recent, and having occurred within a week of the March 21 x-rays. RP 142-45.

The defendant was charged with second degree assault, and was found guilty of the lesser offense of fourth degree assault. CP 58. A restitution hearing began on May 31, 2018.[3] At that hearing, Dupuy testified the assault-related broken two vertebrae and rib fracture made his preexisting medical conditions worse. 2RP 6. He also explained, from a ledger, which visits to Dr. Lahtinen were associated with the assault and which visits were not assault-related. 2RP 9-10.

Mr. David Hillman worked with Dr. Lahtinen at "The Doctors Clinic." 2RP 21. He was responsible for the billing and coding department of that office. *Id*. He previously had reviewed the ledger[4] consisting of Dupuy's 14 assault-related visits and had previously checked the doctor's notes for each of these 14 individual visits. 2RP 21-22. He testified, based upon his examination of the records and notes, that each of these 14 visits

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lumbar vertebrae help support the weight of the body, and permit movement. https://en.wikipedia.org/wiki/Lumbar_vertebrae (last reviewed February 8, 2019).

[3] 2RP 1-53.

[4] CP 138.

was primarily related to the assault in the present case. 2RP 21-22.[5] In preparing this list, Mr. Hillman excluded from the ledger the other visits that were not related to the injuries resulting from the assault. *Id*. Mr. Hillman was also able to determine which parts of the billing were attributable to Dupuy's out-of-pocket expense and the amount attributable to Medicare payments made to the Clinic. 2RP 23. Mr. Hillman tallied the payments received by the Clinic from Medicare Part B for the 14 assault-related visits, the sum of which totaled $784.79.[6] He also calculated the total out-of-pocket payments made by Dupuy for the 14 visits, and testified that $236 was the accurate sum of those payments.

The defendant *stipulated* to the out-of-pocket expenses of Dupuy in the amount of $109.94 outstanding to Inland Imaging.[7] However, the

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[5] 2RP 22:

> Question [by the Prosecutor]: So every one of those is related to the assault from March of 2016?
>
> Mr. Millman: It is.

[6] These payments were received from the Medicare Service Center at 900 42nd Street, South Fargo, North Dakota. 2RP 25.

[7] *See* CP 147-48:

> Mr. Marlin would stipulate to the out of pocket expenses of Dupuy in the amount of $109.94 outstanding to Inland Imaging and $86.91 to the Doctor's Clinic. Mr. Marlin would not stipulate that the state has met its burden of proving this amount by "substantial credible evidence" but is willing to expressly agree to pay that restitution amount as

amount determined by the trial court after review of the Inland Imaging Ledger (CP 112) and testimony regarding that document (2RP 8-11) was an amount of $157.00. CP 203.

After both parties argued their respective positions on the restitution issue, the trial court asked defendant's counsel how their position, that an insurance company has to present a *claim* for restitution before any assessment for such restitution could be entered, could be reconciled with *State v. Ewing*, 102 Wn. App. 349, 7 P.3d 835 (2000), which held that a trial court could order the defendant to pay restitution to an insurance company without regard to whether the company had or could pursue a civil subrogation claim. 3RP 43-44. The trial court also had concerns with the defendant's position that the fortuity of injuring a crime victim with a preexisting condition somehow exempted the defendant from restitution for aggravating that injury or apportioning the costs of the additional services.

> THE COURT: All right. Okay. And I guess the other thing that I'm having difficulty wrapping my mind around is, somebody who has a preexisting condition and would have to go to the doctor anyway to manage that preexisting condition, and the criminal act lit up something else –
>
> MS. FOLEY [Defense Counsel]: Mm-hmm.
>
> THE COURT: -- that apportionment and -- I mean, what authority is the defense relying on to say that, if you have a

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Mr. Marlin believes it is appropriate and an amount which has some foundation in the limited records provided.

> crime victim who has a preexisting condition that requires ongoing maintenance by a physician, that having that ongoing -- they obviously can't stop their ongoing maintenance but that additional services provided during the course of that routine maintenance for the preexisting condition, that that somehow changes the person from being able to recover that as restitution.

3RP 44-45.

Continuing, the trial court found it significant that, in this case, the issue of whether the damages were easily ascertainable was satisfied by the fact that the chief insurance coder from the treating doctor's office had testified regarding the medical records and apportionment of the insurance costs. The court found that this testimony separated the instant case from other cases where only documentary summaries had been submitted:

> THE COURT: And I agree that there needed to be more. That's why we had the hearing where people could come in and talk about it, because just the summary documents stapled to a brief I agree wasn't particularly helpful. However, kind of the distinguishing factor is that the folks came in and then they had the testimony from the person at the doctor's office who reviewed the medical records and is the chief coder, so to speak, for comparing the diagnoses with the code for the insurance company. So it's more than just sort of stapling the ledger to a brief.

3RP 46.[8]

[8] The trial court's oral findings were incorporated into its written findings. CP 202-03.

The trial court concluded by orally finding:

> So I'm finding that the State did meet its burden by a preponderance of substantial credible evidence that showed that the expenses that they're seeking, with Mr. Hillman's testimony about the 14 visits being associated with the injuries sustained on the March 18th, '16, porch incident, that they were related.

3RP 57.

The trial court also entered written findings:

> After reviewing the case record to date, and the basis for the motion, the court finds that the State has proven by a preponderance of the evidence that the requested restitution in this matter is based on the victim's injuries and actual expenses incurred for treatment of those injuries. The trial court previously made a finding that there is a casual link between the assault in this case and the injuries suffered by the victim Louis Dupuy. The court's oral ruling is incorporated by reference.

CP 202-03.

The trial court then entered the restitution order requiring the defendant to pay the following restitution:

> Louis Dupuy (out-of-pocket): $236.00
> Inland Imaging: $157.00 (payable to Louis Dupuy)
> Medicare of Washington: $784.79

CP 203.

Mr. Marlin was sentenced to 364 days of jail, with all 364 days suspended, and with restitution ordered as above.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED THE DEFENDANT TO PAY RESTITUTION FOR DUPUY'S OUT-OF-POCKET EXPENSES AND ALSO ORDERED REIMBURSEMENT TO MEDICARE OF WASHINGTON FOR THE TREATMENT DUPUY RECEIVED RELATED TO THE ASSAULT.

1. Standard of review and purpose of restitution.

A restitution order is reviewed under the abuse of discretion standard. *State v. Enstone*, 137 Wn.2d 675, 679, 974 P.2d 828 (1999). A trial court abuses its discretion when its decision is "'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "Restitution, as a condition of probation, is primarily a rehabilitative tool... Though partial compensation may be a concomitant result of restitution, it is not the primary purpose of such an order." *State v. Barr*, 99 Wn.2d 75, 79, 658 P.2d 1247 (1983). "This purpose is evidenced not only by the enactment of the restitution statute, but also by later amendments, which have sought to increase offender accountability." *State v. Gray*, 174 Wn.2d 920, 929-30, 280 P.3d 1110 (2012) (citing *State v. Gonzalez*, 168 Wn.2d 256, 265, 226 P.3d 131 (2010). A secondary purpose is to compensate victims and their survivors who have suffered "the severe and detrimental impact of crime." RCW 7.69.010; *see, e.g., Gonzalez,*

168 Wn.2d at 265-66 ("Thus ... it is clear the statute is intended to ensure that defendants fulfill their responsibility to compensate victims for losses resulting from their crimes").

Because restitution, as a condition of probation, is primarily a rehabilitative tool, many commentators suggest that restitution increases the defendant's self-awareness and sense of control over his/her own life. *See Barr*, 99 Wn.2d at 79 (citing SIEGEL, *Court Ordered Victim-Restitution: An Overview of Theory and Action*, 5 New Eng.J.Pris.L. 135, 138-41 (1979); and BEST & BIRZON, *Conditions of Probation: An Analysis*, 51 Geo.L.J. 809, 827-28 (1963)). Additionally, the use of restitution has met with some success in reducing recidivism. *Barr*, 99 Wn.2d at 79 (citing B. GALAWAY & J. HUDSON, *Offender Restitution in Theory and Action* (1977)). Restitution is at least as punitive as compensatory. *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005).

Restitution is appropriate whenever there is a causal connection between the defendant's crimes and the injuries. There is no requirement that the damages be foreseeable. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). When interpreting Washington's restitution statutes, courts recognize that these statutes were intended to require the defendant to face the consequences of his or her criminal conduct. *Id*. (citing *State v. Davison*, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991)). Courts do not engage

in overly technical construction that would permit the defendant to escape from just punishment. *Davison*, 116 Wn.2d at 922. The legislature intended "to grant broad powers of restitution" to the trial court. *Id.* at 920.

2. The "out-of-pocket" ($236) and "Inland Imaging" ($157) amounts of restitution ordered by the trial court were within the statutorily authorized amount which allows for up to double the amount of the victim's actual loss.

Assault in the fourth degree is a gross misdemeanor. RCW 9A.36.041. The court's authority to impose restitution in a misdemeanor case is found in three statutes.[9] Under the first, RCW 9A.20.030(1), the trial court is authorized to order up to double the amount of the victim's actual loss from the commission of a misdemeanor crime. *State v. Deskins*, 180 Wn.2d 68, 81, 322 P.3d 780 (2014), *as amended* (June 5, 2014) (misdemeanor animal cruelty case); *cf.* RCW 9.94A.753 (restitution under SRA also allows for an amount up to double each victim's loss).

[9] RCW 9A.20.030(1), RCW 9.92.060(2), and RCW 9.95.210.

a) The $236 out-of-pocket expenditures.

Because the defendant stipulated[10] to $139 "out-of-pocket loss" for Dupuy, the $236.00 out-of-pocket loss ordered by the trial court[11] is within the doubling authorization found under the restitution statute. Moreover, that amount was specifically determined to be the actual out-of-pocket amount attributable to the assault by Mr. Hillman,[12] and his testimony was considered very credible by the trial court. 3RP 57. Therefore, there was no error in the trial court ordering that amount.

b) The $157 remaining Inland Imaging amount.

The $157 for Inland Imaging is not attributable to any preexisting injury; the tests (MRI, CAT scan, and x-rays) were ordered by Dr. Lahtinen after the assault and were reviewed by both Dr. Lahtinen and

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[10] CP 147 ("Mr. Marlin would stipulate to the out of pocket expenses of Dupuy in the amount of $109.94 outstanding to Inland Imaging"); *see also* Br. of Appellant at 14 ("However, Mr. Marlin stipulates that the assault was the 'but-for' cause of the x-rays and CT scan ordered, as well as the March 21, 2016 and March 23, 2016 follow-up appointments to review the results of the x-rays and CT scan. These losses were direct results of and caused by the March 18, 2016 assault and Dupuy's out-of-pocket loss for this care amounts to $139.00 ($14.53 per appointment, $109.94 for x-rays and CT scan)").

[11] CP 203.

[12] He calculated the total out-of-pocket payments made by Dupuy for the 14 visits, and testified that $236 was the accurate sum of those payments. 2RP 23-24.

neuroradiologist Dr. William Keyes.[13] Additionally, the defendant, at the trial court level, agreed to and stipulated[14] that the $109.94 outstanding balance owed to Inland Imaging was proper. That stipulation, again, is within the doubling authorization set forth in RCW 9A.20.030(1). That leaves only the $784.79 amount payable to Medicare of Washington.

3. The defendant claims that because Medicare of Washington has not put in a claim for the $784.79 paid to and received by the Doctor's Clinic on behalf of Dupuy, restitution cannot be ordered. This claim is incorrect because it is entirely appropriate to order restitution to insurance companies that have had to pay for losses caused by a defendant's criminal actions.

Mr. David Hillman ran the billing and coding department of the doctor's office. 2RP 21. He reviewed the ledger (CP 138) consisting of 14 visits, and checked on the doctor's notes for each of these 14 individual visits. 2RP 21-22. He testified, based upon his examination of the records and notes, that each of these visits was *primarily related* to the assault in the present case. 2RP 21-22. Mr. Hillman excluded the other visits that were

[13] Dr. Williams Keyes, a specialist in neuroradiology, reviewed the x-rays, MRI and CAT scan that were ordered by Dr. Lahtinen after the assault. He testified that the injuries he observed were acute or recent, having occurred within the week of the March 21 x-rays. RP 142-45. He also reviewed an MRI done two days later, on March 23, 2016. He testified that the MRI did not show the fractures really well "but it showed edema along the lateral aspect of the spine." He also stated that on one of the images you could see the actual transverse process fracture. "So it was verified on the MRI done two days later showing -- showing edema and the fracture that -- he also had a CAT scan done the same day." RP 144.

[14] CP 147.

unrelated to the assault from this ledger. *Id*. Mr. Hillman was also able to determine which parts of the billing were attributable to Dupuy's out-of-pocket expense *and the portions where Medicare had processed the claim and paid the office*. Mr. Hillman tallied the payments received by the clinic from Medicare Part B for the 14 *assault-related* visits, the sum of which totaled $784.79. 2RP 23. Again, each of the 14 visits was *independently* reviewed by Mr. Hillman. 2RP 24. The trial court found his testimony credibly established the "actual expenses incurred for the treatment of those [assault] injuries." CP 203.

However, the defendant argued that because the insurance company had not yet put in a claim for compensation for payments made by Medicare of Washington, no restitution should be ordered:

> But, again, Your Honor, in regards to the claim for Molina and Medicare, I haven't been doing this forever, but I feel like I've been doing this long enough that every time there's a request for an insurance subrogation, I see the letter from the insurer, you know, to date this is what we've paid out; this is what we need back. And then they usually provide a statement of benefits that shows their math. I don't have that in this case. And it's difficult, because I feel like I'm put in a position to prove a negative, which is hard.

3RP 49.

The trial court, having reviewed *Ewing*, 102 Wn. App. 349, parried the defendant's position:

> [H]ow you get around *Ewing*, because the very first sentence of it -- it's kind of striking. It says an insurance company that pays benefits to a crime victim suffers a loss as a direct result of the crime, and a sentencing Court may order the defendant to pay restitution to the insurance company without regard to whether the company could pursue a civil subrogation claim. So I looked, and I didn't see any case law in the briefing that said, as a condition precedent to assessing a restitution amount to an insurance company, that there has to be presented a claim of restitution. And *Ewing* suggests that it doesn't. So I'm wondering how you reconcile that?

3RP 43-44.

The trial court's position was correct. It is entirely appropriate to order restitution to insurance companies that have had to pay for losses caused by a defendant's criminal actions. *Ewing*, 102 Wn. App. 349. "The language of restitution statutes indicates the Legislature's intent to grant broad discretion to sentencing courts in awarding restitution." *Id.* at 352; s*ee also Kinneman*, 155 Wn.2d 272. The rules of the civil law should not be imported as a limitation to the sentencing authority granted by the legislature to criminal courts. *Ewing*, 102 Wn. App. at 354. The questions the sentencing court must answer are whether the claimed loss resulted from the crime, and whether it is the kind of loss for which restitution is authorized. Because Mr. Hillman was able to determine *the portion where Medicare had processed the claim and paid the office*, and the trial court

found that testimony reliable,[15] the trial court's determination that $784.79 was due Medicare of Washington was fully supported by the record.

4. Defendant's overarching claim is that because the defendant was seeing the doctor for preexisting injuries anyway, approximately 12 of the appointments could not satisfy the "but for" causation standard. This claim both ignores the trial court's findings which are supported by the record, and rests on an overly strict view of the principle of causation in restitution.

Mr. Marlin stipulates that the assault was the "but-for" cause of the x-rays and CT scan ordered, as well as the March 21, 2016 and March 23, 2016 follow-up appointments to review the results of the x-rays and CT scan. He agreed that these losses were caused by the March 18, 2016 assault and that Dupuy's out-of-pocket loss for this care amounted to $139.00 ($14.53 per appointment, $109.94 for x-rays and CT scan). Br. of Appellant at 14.

[15] 3RP 46: "However, kind of the distinguishing factor [here] is that the folks came in and then they had the testimony from the person [Mr. Hillman] at the doctor's office who reviewed the medical records and is the chief coder, so to speak, for comparing the diagnoses with the code for the insurance company. So it's more than just sort of stapling the ledger to a brief."

But Mr. Marlin objects to the imposition of restitution for the cost of the other appointments[16] wherein Dupuy and his doctor had to discuss both his injuries related to the assault as well as preexisting conditions:

> Whether Dupuy's monthly appointments that continued to occur after the March 18, 2016 assault-just as they had occurred before it-were related to or associated with the assault, or whether any injuries related to the assault were discussed at one or more of those appointments, is legally irrelevant when considering whether restitution should be imposed. The only appropriate consideration is whether, but for the March 18, 2016 assault, these appointments would have occurred.

Br. of Appellant at 15.

> Mr. Hillmans attestation that Dupuy's appointments from March 21, 2016 through May 15, 2017 were "primarily related to the assault" does not establish that, but for the assault, these appointments would not have occurred.

Br. of Appellant at 15.

The appellant's position loses sight of both the purpose of restitution and the trial court's broad authority in granting restitution, especially in cases such as this (misdemeanor) where jail time is suspended and the restitution is imposed as an alternative to imprisonment.

First, the evidence establishes that Mr. Hillman was able to determine which interviews were directly associated with the assault and

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[16] *See* Br. of Appellant at 14. These appointments occurred on 3/l8/16, 4/20/16, 5/16/16, 6/14/16, 7/12/16, 8/9/16, 10/4/16, 11/28/16, 12/16/16, 3/20/17, 4/18/17, and 5/15/17.

separate those from his other appointments. The trial court found Hillman's testimony regarding the apportionment both convincing and credible. That is sufficient to establish the necessary relationship between the crime charged and the injuries for which the restitution is ordered. *See State v. Tobin*, 132 Wn. App. 161, 173, 130 P.3d 426 (2006), *aff'd*, 161 Wn.2d 517, 166 P.3d 1167 (2007):

> "Easily ascertainable" damages are tangible damages supported by sufficient evidence. *State v. Bush*, 34 Wn. App. 121, 123, 659 P.2d 1127 (1983). But "[c]ertainty of damages need not be proven with specific accuracy." *State v. Pollard*, 66 Wn. App. 779, 785, 834 P.2d 51 (1992) (citing *State v. Mark*, 36 Wn. App. 428, 434, 675 P.2d 1250 (1984)); *see also Bush*, 34 Wn. App. at 124, 659 P.2d 1127. Instead, Washington courts have held that "'[o]nce the fact of damage is established, the precise amount need not be shown with mathematical certainty.'" *Bush*, 34 Wn. App. at 123, 659 P.2d 1127 (quoting *Quincy Farm Chems., Inc.*, 29 Wn. App. 93, 97–98, 627 P.2d 571 (1981)); *see also Pollard*, 66 Wn. App. at 785, 834 P.2d 51; *Mark*, 36 Wn. App. at 434, 675 P.2d 1250.

Second, even under appellant's strict construction of causation, "but for" the assault, the doctor would not have had to discuss the additional injuries caused by the assault *at any appointment*, and it is proper to apportion that time spent to the defendant, especially where the time spent during these appointments discussing medical issues related to the assault constituted the *primary purpose* of the appointment. *See* Mr. Hillman's testimony 2RP 23-24. Defendant's claim, if carried to its illogical

conclusion, would eliminate funeral costs to the families of murdered victims because the victims would have died anyway at some point in time. Doctor's time, like lawyer's time, is billed. The trial court found Mr. Hillman's apportionment of the costs was sufficiently accurate to impose the restitution it ordered.

Finally, this position ignores the maxim that one takes their victims as they find them. For example, in *State v. Hiett*, 154 Wn.2d 560, 572, 115 P.3d 274 (2005), the Court discussed the interplay between foreseeability, "but for" causation, and an independent superseding cause:

> But when *Enstone* concluded that "a finding of foreseeability is not a necessary element for a restitution order" it did so in the context of refuting a claim that the direct result of a criminal act must be "foreseeable" in order to impose restitution. This comports with Washington's "but for" causation standard for restitution. If one pushes a person who falls, one need not foresee that the victim had a million dollar china doll in the victim's pocket to be liable in restitution for the entire amount of the damages. This concept also has a tort law equivalent: the "eggshell skull" rule. *See, e.g.*, *Gibson v. County of Washoe*, 290 F.3d 1175, 1192 (9th Cir. 2002). But if one pushes another and while falling that person is shot by a third party, you should not be liable for restitution for the damages caused by the gunshot wound.

Here, the victim, Dupuy, testified that his preexisting injuries were aggravated by the assault. As our State Supreme Court noted in *Enstone*,

137 Wn.2d at 682, also involving a staircase injury, *a defendant takes his victims as he finds them*:[17]

> Finally, although we have concluded that a finding of foreseeability is not a necessary element of a restitution order, we feel constrained to observe that the argument that Janes's injuries were not a foreseeable consequence of Enstone's criminal conduct is difficult to accept. Enstone's counsel acknowledges that Enstone's neighbors saw him push Janes down the front stairs of his house, and Enstone conceded in his guilty plea that he that he intentionally inflicted "substantial bodily harm" upon Janes… While Janes's severe intoxication may have contributed to her inability to repel the assault, as the trial court observed, one takes their victim as they find them. Logic would suggest, therefore, that the injuries sustained by Janes were a foreseeable consequence of Enstone's conduct.

In another field of law dealing with compensation for injuries, worker's compensation, the Court addressed the similar situation where the aggravated injury of a preexisting condition does not prevent compensatory recovery because that prior condition is but a condition upon which the real cause operated:

> If a worker is to be taken with all of his or her preexisting frailties and bodily infirmities, it is axiomatic that older, more mature workers will often have bodies experiencing degenerative processes and feeling the effects of wear and tear over the years. It is, of course, the skill and knowledge gained by years of experience that make mature workers so valuable to their employers. A worker's PPD cannot be

[17] The trial court also noted that the present case involved a preexisting injury that was "lit up" by the defendant's actions. 3RP 44-45.

> reduced merely because x-rays suggest preexisting degenerative arthritic changes at the time of the injury without additional evidence that the degeneration resulted in loss of functionality sufficient to make that degeneration a preexisting PPD. In sum, if an accident or injury is the proximate cause of the disability for which compensation is sought, the previous physical condition of the worker is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness because the worker's prior physical condition is not deemed the cause of the injury but merely a condition upon which the real cause operated.

Tomlinson v. Puget Sound Freight Lines, Inc., 166 Wn.2d 105, 117, 206 P.3d 657 (2009) (citations omitted).

Overly strict view of the "but for" analysis.

The defendant uses a far too rigid "but for" analysis when dealing with restitution. While it is true that our appellate courts have used language suggesting that "direct causation" or a "but for" analysis may be used to support a claim of criminal restitution, "we should not regard this language as suggesting a narrower concept of criminal causation that differs from tort law." *State v. Shears*, 920 N.W.2d 527, 540 (Iowa 2018). In *Hiett*, 154 Wn.2d at 564-65, our Supreme Court noted that foreseeability was also a proper analytical test for the determination of restitution, especially considering the broad language used in the statutes to ensure that victims are fully compensated:

> Essentially, the defendants contend that case law has limited restitution by requiring a causal relation between the

> defendants' conduct and the victim's injury. But this misreads our case law. Our legislature clearly intended to make restitution widely available to the victims of crimes, at least when their injuries were a foreseeable consequence. To accomplish this legislative purpose, courts will look not only to the abstract elements of the crime but also to the defendants' actual conduct. *Landrum*, 66 Wn. App. 791, 832 P.2d 1359, is illustrative. In *Landrum*, two defendants were charged with first degree child molestation based on sexual contact with a minor. *Id*. at 794, 832 P.2d 1359. After entering Alford [*North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)] pleas to fourth degree assault, both were ordered to pay restitution for their victims' counseling costs. *Id*. Both appealed the restitution order, arguing that the legislature intended restitution for counseling to be limited to victims of sex crimes and that the generally defined elements of fourth degree assault were not reasonably related to such counseling. *Id*. at 798–99, 832 P.2d 1359. The court upheld the restitution orders, holding that a court looks "to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." *Id*. at 799, 832 P.2d 1359. Put another way, since the victims' injuries were a reasonably foreseeable consequence of the underlying facts of the crime, the crime was reasonably related to the victims' counseling expenses.

This concept of foreseeability and attenuation in criminal restitution cases was, perhaps, best expressed in *Shears*, where the Supreme Court of Iowa determined that general foreseeability was the overall applicable standard in criminal restitution cases:

> It is true that, along with the court of appeals, we sometimes have used language suggesting that "direct causation" is required to support a claim of criminal restitution. *See Hagen*, 840 N.W.2d at 148; *Stessman*, 460 N.W.2d at 464; *Stewart*, 778 N.W.2d at 64; *Knudsen*, 746 N.W.2d at 610. We do not regard this language in these cases as suggesting

> a narrower concept of criminal causation that differs from tort law. Such an interpretation would be contrary to the express language of Iowa Code section 910.1(3) incorporating civil liability standards into the definition of pecuniary damages. Rather, we regard the language as reflecting the ordinary principle of tort law embraced since the days of *Palsgraf*, namely, that under certain circumstances, damage may be so attenuated or removed from the wrongful act that causation in tort simply cannot be found. *See Palsgraf v. Long Island R.R.*, *248 N.Y.* 339, 162 N.E. 99, 103–04 (1928) (Andrews, J., dissenting); *see also Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007) (discussing "legal cause"); *Benn v. Thomas*, 512 N.W.2d 537, 539–40 (Iowa 1994) (noting that courts ordinarily require foreseeability as a limit to the existence of proximate cause in a tort claim).

Shears, 920 N.W.2d at 539-540.

Here, the damage to Dupuy was not so attenuated from the restitution ordered that it should not have been ordered, especially considering that "one takes his victims as he finds them." *Enstone*, 137 Wn.2d at 683; *and see State v. Lohr*, 130 Wn. App. 904, 909, 125 P.3d 977 (2005) (this Court noting in criminal reckless burning case that even if the burned building was susceptible to fire, "one takes their victim as they find them"). The trial court did not abuse its discretion in entering its restitution order.

B. THIS COURT SHOULD STRIKE THE $200 CRIMINAL FILING FEE.

The record here indicates the defendant is indigent under RCW 10.101.010(3). CP 102-03. Recently, HB 1783 amended

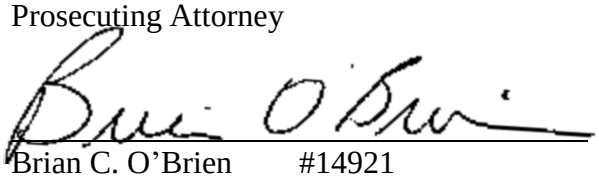
RCW 36.18.020(2)(h), which now states the $200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.01.160(3)(a) through (c)." HB 1783 applies prospectively to his case. *State v. Ramirez*, 191 Wn 2d 732, 426 P.3d 714 (2018). Therefore, this Court should order that the lower court enter an order striking the $200 criminal filing fee.

IV. CONCLUSION

The trial court did not abuse its discretion in ordering restitution in the amounts it deemed were attributable to the defendant's actions.

Dated this 8 day of February, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. THOMAS MARLIN, Appellant.	NO. 35922-1-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 8, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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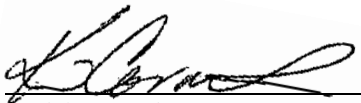
2/8/2019 **(Date)** Spokane, WA **(Place)**  **(Signature)**

SPOKANE COUNTY PROSECUTOR

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